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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

23 Cr. 490 (SHS)

5 NADINE MENENDEZ,

6 Defendant.

7 -----x

Curcio Hearing

8 March 21, 2024
9 11:35 a.m.

10 Before:

11 HON. SIDNEY H. STEIN,

12 District Judge

13
14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

18 BY: ELI J. MARK

19 PAUL M. MONTELEONI

LARA E. POMERANTZ

DANIEL C. RICHENTHAL

Assistant United States Attorneys

20 SCHERTLER ONORATO MEAD & SEARS, LLP

Attorneys for Defendant

21 BY: DAVID SCHERTLER

22 DANNY C. ONORATO

23 COZEN O'CONNOR P.C.

Conflicts Attorneys for Defendant

24 BY: SARAH R. KRISOFF

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Also present: Avi Weitzman, Attorney for Robert Melendez

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1 (Case called)

2 THE COURT: Counsel, make your appearances.

3 You may be seated in the back of the courtroom.

4 MR. MARK: Good morning, your Honor. Eli Mark on
5 behalf of the government. With me at counsel table are my
6 colleagues, Paul Monteleoni, Laura Pomerantz, and Daniel
7 Richenthal.

8 THE COURT: Good morning.

9 MR. SCHERTLER: Your Honor, good morning. David
10 Schertler, on behalf of my client, Nadine Menendez, who is
11 present next to me.

12 THE COURT: Good morning.

13 MR. SCHERTLER: Along with me are my partner Danny
14 Onorato and also Sarah Krissoff on behalf of Ms. Menendez.
15 Judge, you may recall from our prior hearing that Ms. Krissoff
16 is here as independent conflicts counsel. She is with a
17 separate firm not affiliated with us.

18 THE COURT: Welcome. Please be seated.

19 Counsel, I have read the correspondence in this matter
20 concerning the *Curcio* hearing, and I think it is time that the
21 parties started talking together, talking to each other and
22 working together to the extent they can, instead of fencing.

23 I think the defense is correct here in saying it is
24 about time for the government to fish or cut bait in regard to
25 whether or not they are going to be calling Mr. Schertler or

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1 anybody else from his firm. The trial is seven weeks away.

2 MR. SCHERTLER: Six. I think closer to six weeks,
3 your Honor.

4 THE COURT: I think it's split right down the middle,
5 actually, six and a half, when I last looked about a minute
6 ago.

7 I don't know if anybody is going to appeal the final
8 interlocutory appeal. I don't know what the Second Circuit is
9 going to do. But from the standpoint of the Court, this case
10 is going to trial on May 6, either six, six and a half, or
11 seven weeks away. It is time.

12 Government, you should let -- talk to each other. You
13 should let the defense know whether Mr. Schertler or anyone
14 else from the firm is going to be called as a witness or you
15 are going to introduce information that would make them unsworn
16 witnesses and the parties are then to discuss a stipulation. I
17 have little doubt that stipulation can be arrived at, as it has
18 in the past, but that will be up to the parties. So tell me
19 two weeks from today what the situation is there. It seems to
20 me that that is what we should be doing.

21 And I propose to hold a *Curcio* hearing not on the
22 assumption that Mr. Schertler or anyone else in his firm will
23 be a witness—my assumption is the government and defense will
24 be able to work it out by means of a stipulation—but, instead,
25 to have a *Curcio* hearing on what I call the second bucket of

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1 questions. The first bucket of questions is if one of the
2 attorneys is a witness, in which event it is pretty
3 straightforward. There would have to be disqualification and
4 Mrs. Menendez would have to get a new attorney.

5 The second bucket of issues in *Curcio*, it seems to me,
6 is assuming that that is worked out, nonetheless, that there
7 are issues about the defense won't be able to make certain
8 arguments to the jury even if a stipulation is arrived at, and
9 I think it is important that Mrs. Menendez understand that. So
10 that's what I propose to do.

11 Mr. Mark, you look a little quizzical.

12 MR. MARK: No, your Honor. I think that's consistent
13 with what we would hope to have happen today, that the Court
14 conduct a *Curcio* on the potential conflict right now. And the
15 government has had, actually, lengthy good-faith discussions
16 with defense counsel prior to today in which we have made clear
17 that we would intend to call Mr. Schertler as a witness absent
18 the ability to reach an anonymized stipulation, which the
19 government would intend to discuss in good faith and then,
20 after two weeks, we will see whether we are able to reach that
21 or not and, depending on --

22 THE COURT: Well, you are going to have to see before
23 two weeks whether or not you can reach that, but I think we are
24 talking about the same thing.

25 MR. MARK: We agree, your Honor.

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1 THE COURT: Okay, good. Well, I'm glad to hear the
2 parties are talking. That did not come through at all in the
3 correspondence. So that's a step in the right direction.

4 Mr. Schertler, why don't I give you a moment or
5 Ms. Krissoff, or both of you, to let Mrs. Menendez know what I
6 have just decided and what the import of that is for the *Curcio*
7 hearing. And I take it you have no objection to the *Curcio*
8 hearing on the basis that I have just set forth.

9 MR. SCHERTLER: No, your Honor, and I think that's
10 what we were proposing.

11 THE COURT: It is.

12 MR. SCHERTLER: And if we can reach a stipulation,
13 come back and report back to the Court in two weeks, and then
14 we could conduct a *Curcio* hearing, as you say, on the second
15 bucket, which I think is more limited.

16 THE COURT: No, I was proposing we do a *Curcio* hearing
17 now on the second bucket on the assumption, which I think is a
18 good assumption, that the parties will be able to work out an
19 anonymized affidavit.

20 MR. SCHERTLER: So --

21 THE COURT: Stipulation.

22 MR. SCHERTLER: So, my only concern about doing that
23 at this point is that without knowing exactly what the
24 stipulation says it might be a little more difficult to conduct
25 that kind of hearing.

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1 THE COURT: Well, the stipulation is either going to
2 obviate the need to call Mr. Schertler or not. So if the
3 stipulation is successful—and, again, I have every reason to
4 believe it will be—then the only issue left is the second
5 bucket.

6 MR. SCHERTLER: So if I understand the Court
7 correctly --

8 THE COURT: I propose to have a *Curcio* hearing on the
9 second bucket.

10 MR. SCHERTLER: With the assumption that the parties
11 reach --

12 THE COURT: Exactly.

13 MR. SCHERTLER: -- an agreeable anonymized stipulation
14 that would substitute for any testimony from the lawyers.

15 THE COURT: Exactly. Exactly right. And I thought
16 you should let Mrs. Menendez know exactly what's going to
17 happen. Does that make sense, sir?

18 MR. SCHERTLER: Yes.

19 THE COURT: And I will put it right on the record that
20 it's on the assumption that a stipulation will be reached.

21 MR. SCHERTLER: Understood.

22 THE COURT: Fine. Take a moment if you wish.

23 (Defendant and defense counsel confer)

24 THE COURT: Speak away from the microphones, please.

25 (Defendant and defense counsel confer)

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1 MR. SCHERTLER: Your Honor, would you give us just a
2 few moments outside.

3 THE COURT: Of course. Absolutely.

4 MR. RICHENTHAL: One of the witness rooms might be
5 open.

6 MR. SCHERTLER: Thank you. And this won't be more
7 than five minutes.

8 THE COURT: Take your time. Whatever time you need.

9 I'm going to step off the bench and my deputy will
10 call me when you are ready.

11 (Recess)

12 THE COURT: Mr. Onorato, are you ready to go?

13 MR. ONORATO: Your Honor, Mr. Schertler is going to be
14 speaking. But, yes. You don't want to hear from me this
15 morning.

16 THE COURT: All right.

17 MR. SCHERTLER: Your Honor, we are ready to go, and I
18 think we have explained this to Ms. Menendez. She understands.

19 Could I raise one preliminary point? In the
20 government's colloquy, they have tied in to this hearing and
21 any waiver the prospect that if we can't reach a stipulation
22 two weeks from now that then -- and the attorneys were then
23 required to testify at trial, obviously that would result -- I
24 think we all agree that would result in disqualification.

25 THE COURT: Yes, sir.

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1 MR. SCHERTLER: If that happens two weeks from now,
2 which I think, by your calculation is four and a half weeks
3 before trial, it would be impossible for Ms. Menendez to get
4 new counsel and be ready for trial on May 6. And I'm not sure
5 why we are tying that trial date in to the colloquy, because it
6 just seems to us that if there is an ultimate disqualification
7 any time between now and the May 6 date, there would be no way
8 that Ms. Menendez could be ready for trial on May 6.

9 Does the Court agree with that?

10 THE COURT: I don't think it's going to come to pass,
11 so I don't want to answer in the abstract.

12 I understand the issue. There are so many balls up in
13 the air. I don't know whether anyone is going to appeal
14 from -- take an interlocutory appeal. I think that the time
15 for that is up, I think, next week. And if there is an
16 interlocutory appeal taken, I don't know what the Second
17 Circuit is going to do in regards to a stay. So I think what
18 we need to do is take it step by step.

19 MR. SCHERTLER: Correct. And I'm just isolating our
20 issue irrespective of how any other issue works out, knowing
21 that the Court has been pretty adamant about trying to proceed
22 on May 6. But it seems to me that disqualification such a
23 short time before trial, if that occurs, and we are hoping it
24 won't --

25 THE COURT: Right. Therefore, what we should do is

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1 proceed on the basis of questioning -- assuming it will work
2 out and the questioning on the *Curcio* is only in regard to what
3 I call bucket two.

4 MR. SCHERTLER: All right. And that if it doesn't
5 work out, Ms. Menendez is not making any commitment to be ready
6 for trial on May 6.

7 THE COURT: I understand. I understand.

8 MR. SCHERTLER: Thank you.

9 THE COURT: I'm going on the assumption it will work
10 out.

11 Sir.

12 MR. MARK: Your Honor, none of us can predict the
13 future, and we obviously are going to continue to engage in
14 good-faith, I think, discussions with defense counsel as your
15 Honor knows from prior appearances we have for many months on
16 these similar issues.

17 I do think, though, it is prudent, though we can't
18 foresee the future, that Ms. Menendez be generally asked about
19 the possibility that if her counsel is not able to enter into a
20 stipulation prior to trial, that it is possible about what
21 might happen later on and that it could mean that new counsel
22 might have less time to prepare for trial than otherwise.

23 THE COURT: Understood.

24 Let's proceed. Mrs. Menendez, if you would rise
25 please.

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1 I take it, Mrs. Menendez that your lawyers have just
2 told you -- discussed with you what my decision was, and what
3 we are going to do today, is that correct?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Essentially, as I think you know, there is
6 a possibility that the government is going to want to call one
7 or more of your lawyers as witnesses at trial because the
8 government believes they have information, factual information,
9 that they wish to bring out at the trial.

10 Do you understand that?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: And I'm going to use Mr. Schertler as the
13 name, I will say "Mr. Schertler," but really it applies to each
14 of the lawyers from the firm of Schertler Onorato Mead & Sears
15 that you have worked with.

16 Do you understand that?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Okay. If the government in fact calls one
19 or more of the lawyers as witnesses, essentially they have to
20 be disqualified from representing you because a lawyer cannot
21 be both a fact witness and a lawyer for one of the parties.
22 That's a conflict.

23 Do you understand that?

24 THE DEFENDANT: Yes.

25 THE COURT: Now, normally or usually, in examples such

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1 as this, the government and the defense are able to work out a
2 stipulation whereby the government can put in evidence but the
3 name Mr. Schertler, or any of the other names of the lawyers in
4 your firm, doesn't come out. So the jury is unaware that the
5 facts that are being stipulated to involve, for example,
6 Mr. Schertler.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: That's the type of stipulation that was
10 just referred to by Mr. Schertler as an anonymized stipulation
11 so the jury won't know who the people are that the stipulation
12 involved.

13 And if that happens—and my assumption today is that
14 it will happen, that is, the parties will be able to arrive at
15 a stipulation—then Mr. Schertler will be able to continue and
16 his colleagues will be able to continue to represent you.

17 Do you understand that?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: And I have told the government and the
20 lawyers they have two weeks to arrive at that stipulation. If
21 they can't arrive at the stipulation, we will get together and
22 we will see what we are going to do then.

23 As of now, the trial is set to begin on May 6, and you
24 have heard us discuss the various permutations in regard to
25 that. But that is my intention at this point, to have the

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1 trial start on May 6.

2 If it happens that the parties can't arrive at a
3 stipulation, that would give you about four and a half weeks to
4 trial, which is very little time to prepare. Now, you have
5 been working with your lawyers for quite some time. The
6 parties have known about this case for a considerable period of
7 time and a lot of work has already happened. But nonetheless,
8 I understand parties need time in order to prepare and indeed
9 there are going to be some motions addressed to the Superseding
10 Indictment 4 which haven't even yet been filed. I think they
11 are due on Monday. And despite the defense's saying at our
12 last conference that they were going to be lean and mean in
13 terms of those motions, the motions are going to require work
14 by the parties and by the Court. So all of that takes time.
15 Nonetheless, I certainly am going to try to stick to that May 6
16 date or as close to it as possible even if your counsel is
17 disqualified.

18 Do you understand that?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Okay. Now, I'm going to be asking you
21 questions in what's called a *Curcio* hearing—it's after a case
22 called *United States v. Curcio*—where it is important that you
23 understand the nature of the potential conflict that will arise
24 from the law firm of Schertler Onorato Mead & Sears continuing
25 to represent you. I'm going to be questioning you on the

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1 assumption that the parties can work out a stipulation. If
2 they can't work out a stipulation, that's easy, they are
3 disqualified, you need to get new counsel, we will handle the
4 starting date at that point. But again, I want to adhere as
5 closely as possible to that May 6 date. If they do arrive at a
6 stipulation, that takes -- then the issue is not that they are
7 disqualified, but that there is a potential conflict in their
8 representation.

9 I'm going to take about a half hour to explain to you
10 what the various permutations of that potential conflict are.
11 It's a potential conflict. It may or may not arise. And you
12 have the ability to waive that conflict if you so choose.

13 Do you understand?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Okay. So that's what I am going to be
16 questioning you about.

17 State your full name for the record, please.

18 THE DEFENDANT: Nadine Menendez.

19 THE COURT: Do you speak and understand English?

20 THE DEFENDANT: Yes, I do.

21 THE COURT: Is English your native language?

22 THE DEFENDANT: French is.

23 THE COURT: French is. Do you use English in
24 everyday --

25 THE DEFENDANT: Yes.

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1 THE COURT: Okay. You are fluent, I take it, in
2 English?

3 THE DEFENDANT: Yes, I am.

4 THE COURT: How old are you, Ms. Menendez?

5 THE DEFENDANT: 57.

6 THE COURT: And what's the highest level of education
7 you have obtained?

8 THE DEFENDANT: A master's.

9 THE COURT: So you have a bachelor --

10 THE DEFENDANT: I have a bachelor's --

11 THE COURT: A bachelor's of art?

12 THE DEFENDANT: Yes.

13 THE COURT: And what's the masters in?

14 THE DEFENDANT: I have a bachelor's from NYU in French
15 culture and civilization and a master's from NYU in French
16 culture and civilization.

17 THE COURT: All right. Thank you. In the past 24
18 hours have you taken any pills, drugs, or medication of any
19 kind?

20 THE DEFENDANT: No.

21 THE COURT: Is your mind clear today?

22 THE DEFENDANT: Yes.

23 THE COURT: How are you feeling?

24 THE DEFENDANT: Good. Nervous.

25 THE COURT: Well, of course. I understand that.

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1 Everybody is nervous in this situation. But otherwise your
2 mind is clear, I take it?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: In the past 24 hours, have you taken any
5 alcoholic beverages?

6 THE DEFENDANT: No, your Honor.

7 THE COURT: Have you ever been treated or hospitalized
8 for any mental illness or alcohol or substance abuse?

9 THE DEFENDANT: No, your Honor.

10 THE COURT: Are you now or have you recently been
11 under the care of a doctor or a psychiatrist?

12 THE DEFENDANT: No, your Honor.

13 THE COURT: Mr. Onorato, Mr. Schertler, you are the
14 two attorneys from your firm here today, is that right?

15 MR. SCHERTLER: Yes, sir.

16 THE COURT: Do either of you have any doubt about
17 Ms. Menendez's competence to proceed today at this hearing?

18 MR. SCHERTLER: No, sir.

19 MR. ONORATO: No, your Honor.

20 THE COURT: I make the finding that Mrs. Menendez is
21 fully competent to proceed today.

22 Mrs. Menendez, you are currently represented by
23 Mr. Schertler, Mr. Onorato, Ms. Pinto, and Mr. MacDougall from
24 the law firm of Schertler Onorato Mead & Sears, LLP, is that
25 correct?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: And are you satisfied with their
3 representation of you?

4 THE DEFENDANT: Very much so.

5 THE COURT: Now, I need to make certain that you
6 understand the potential conflict here. Again, we are
7 proceeding on the basis that the parties will reach that
8 stipulation and the disqualification will not be needed. It's
9 up to you to decide whether or not, in light of the potential
10 risks posed by that firm serving as your counsel, you wish to
11 continue with them as your lawyers or whether you want to find
12 new lawyers.

13 Now, as I told you, I am probably going to refer to
14 Mr. Schertler specifically in these questions, but that
15 question pertains to each and every one of the lawyers who have
16 been representing you at the firm.

17 Do you understand that?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Now, as I go through this, I may ask the
20 same question more than once because I want to make sure that
21 you understand what's happening.

22 Do you understand that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Okay.

25 Now, an attorney is not permitted to argue to a jury

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1 that certain facts are true if she knows those facts are not
2 true. As a result, she may not be able to make certain
3 arguments on your behalf if she has personal knowledge of
4 certain facts.

5 Do you understand that?

6 THE DEFENDANT: Yes.

7 THE COURT: That is essentially the basket of issues
8 that I am going to be talking about. In other words, the
9 government believes these lawyers were present at one or more
10 events that will be the subject of the trial in this action.
11 And if the attorney knows that certain something happened at
12 that -- the meeting that's at issue, they are not allowed to be
13 arguing to the jury that it did not happen. They can't be
14 arguing a fact they know not to be true.

15 Do you understand that?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: So if in fact they were present at that
18 meeting or more meetings, they may be handicapped in the
19 arguments they can make to a jury.

20 Do you understand that?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: And that's the essence of what I am going
23 to be talking about here.

24 I want to be describing the potential conflict here
25 that may arise to make sure that you understand the nature of

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1 the potential conflict and for you to determine whether or not
2 you want to go forward with Mr. Schertler as your lawyer.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Now, at any time this morning you can
6 speak to any of your lawyers and ask them any question you
7 want. In fact, if you want, you can ask me any question. My
8 concern is to make certain you understand what I am asking you
9 and you make certain that -- and to make certain that you
10 understand what I am saying to you.

11 Do you understand that?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Now, you also have the right, and I was
14 going to tell you this, to speak to another lawyer simply about
15 the issue of this potential conflict, and I can appoint
16 somebody to represent you on that issue, the issue of the
17 conflict. And also I wish to tell you that if you can't afford
18 that other attorney, I would appoint that attorney at no cost
19 to you. But I understand from what Mr. Schertler said that you
20 already have an attorney. That's Ms. Krissoff, who is the
21 conflicts attorney. In other words, she has been brought on to
22 assist you in understanding the nature of this potential
23 conflict.

24 Is that right?

25 THE DEFENDANT: Yes, your Honor.

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1 THE COURT: So you have the right to talk to
2 Ms. Krissoff at any point here.

3 And Ms. Krissoff, I understand that your remit is
4 limited to the issue of advising Mrs. Menendez on the issue of
5 the conflict or potential conflict.

6 MS. KRISOFF: That is correct, your Honor.

7 THE COURT: All right. Thank you.

8 And similarly, I've said that you can ask me any
9 question you want, you can ask your lawyers any question you
10 want, you can ask Ms. Krissoff any question you want without
11 the other lawyers being around. Any permutation you want is
12 fine with me. And similarly, if you wish to take a break at
13 any point, I certainly am prepared to do that.

14 Do you understand that?

15 THE DEFENDANT: Yes. Thank you, your Honor.

16 THE COURT: Now, the Sixth Amendment to the
17 Constitution, Mrs. Menendez, gives you the right to have
18 assistance of counsel for your defense, and that means the
19 right to effective assistance of counsel. That's what the
20 cases have said. Now, that means an attorney who is there to
21 protect and advance only your interests and has no other
22 conflict in representing you.

23 Do you understand?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: The obligation of your attorney is a

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1 hundred percent to you. That attorney has a duty of loyalty to
2 you, and only you, not to anybody else, regardless of who may
3 be paying the bills, regardless of the nature of the
4 proceeding.

5 Do you understand that?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Now, an attorney also has a duty of
8 confidentiality. Anything you tell your attorneys, as long as
9 it is done in the context of their representation of you and in
10 the context of your seeking legal advice or receiving legal
11 advice from them, has to be -- remain confidential by the
12 lawyers and by you.

13 Do you understand that?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Your lawyers cannot tell anyone else what
16 you have been telling them and they can't use anything you have
17 been telling them in any way without your consent except in
18 certain very limited circumstances.

19 Do you understand that?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: So Mr. Schertler and his colleagues have
22 both the a duty of loyalty to you and only you and a duty of
23 confidentiality to you and only you that arises out of their
24 representation of you.

25 Do you understand that?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Now, as I have said before, Mr. Schertler
3 and his colleagues will have personal knowledge of facts that
4 are alleged to be relevant to the charges here and his
5 knowledge, their knowledge, arises from his representation of
6 you in this investigation at some point prior to today.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Now, Mr. Schertler, according to the
10 government, is a potential witness in the case because the
11 government believes that Mr. Schertler participated in, among
12 other things, conversations that he had with you and your
13 counsel and counsel for Robert Menendez and Wael Hana,
14 codefendants here.

15 Those conversations that the government apparently
16 believes took place covered communications you had with
17 Mr. Schertler regarding the nature and purpose of payments that
18 codefendants José Uribe made for a Mercedes Benz convertible
19 and codefendant Wael Hana made for payments towards the
20 mortgage on your home, as well as communications you had with
21 Mr. Schertler regarding repaying those individuals, that is,
22 Mr. Uribe and Mr. Hana, for those payments, as well as
23 communications you had with Mr. Schertler regarding a
24 presentation he made to the United States Attorney's Office for
25 the Southern District of New York on August 11, 2023, and

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1 communications he had with counsel for your codefendants,
2 Mr. Menendez, Mr. Uribe, Mr. Hana, regarding those topics.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Okay. So when I was talking about the
6 conflict and the meetings, it's essentially those meetings that
7 are good examples of what the government believes they might
8 want your attorneys to testify about and the subject of which
9 they will attempt to reach that anonymized stipulation.

10 Do you understand that?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Now, without telling me what they told you
13 or without telling me what you told them, have you talked about
14 this issue with your attorneys? Either yes or no.

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: And indeed, have you talked about the
17 issue of the potential conflict here with Ms. Krissoff?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: And as I told you before, none of your
20 attorneys can make arguments to me or to the jury that are
21 inconsistent with their personal knowledge of the facts so,
22 again, as a concrete example, that presentation that was made
23 by Mr. Schertler to the U.S. Attorney's office in August of
24 last year, he knows certain things occurred there. He can't
25 argue to the jury that other things occurred, things that did

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1 not occur actually occurred.

2 Do you follow?

3 THE DEFENDANT: Yes.

4 THE COURT: So therefore he has some constraints on
5 his representation of you by virtue of his having participated
6 in facts underlying the charges here.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Okay. And indeed, your lawyers cannot
10 question other witnesses in a manner suggesting that a fact
11 they personally know is true is false.

12 Do you understand that?

13 It's the same point I was making before, that is, not
14 only can they argue to a jury that certain facts are true if
15 they know them not to be true -- in the reverse, they can't
16 argue that certain facts are not true if they know them to be
17 true, so, too, they can't question witnesses in such a way that
18 they are presenting an argument that a fact they know to be
19 true is not true. It's the same point just in regard to
20 questioning witnesses as opposed to arguing to me or to the
21 jury.

22 Do you understand?

23 THE DEFENDANT: Yes. Thank you, your Honor.

24 THE COURT: This fact might affect the advice you
25 receive or arguments your lawyers make to the jury or me when

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1 they are questioning witnesses.

2 Do you understand that.

3 THE DEFENDANT: Yes, I do.

4 THE COURT: It is also possible that the fact that
5 your lawyers know certain facts to be true might affect their
6 advice to you.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Even if Mr. Schertler, Mr. Onorato, and
10 Ms. Pinto are not called as witnesses, it is possible that
11 other witnesses may be aware that they were personally involved
12 in or have knowledge of certain facts. That may create
13 challenges for them or others in cross-examining those
14 witnesses, and that would not be an issue if you had a lawyer
15 who had not participated in those underlying facts.

16 Do you understand that?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Okay.

19 Now, there is a possibility that your attorneys might
20 have to withdraw as counsel even if they were not themselves
21 actually testifying as witnesses.

22 Do you understand that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Now, Mrs. Menendez -- please.

25 MS. KRISOFF: May I have one moment, your Honor?

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1 THE COURT: Of course.

2 (Defendant and Ms. Krissoff confer)

3 THE DEFENDANT: Thank you, your Honor.

4 THE COURT: Of course.

5 Now, it's important, Mrs. Menendez, that you
6 understand that neither I nor anyone else here can predict and
7 foresee all the ways in which the potential conflict I have
8 outlined to you will actually occur in the course of the trial.

9 Do you understand that?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: But it's important that I understand you
12 understand what the risks are as a result of your lawyers
13 having knowledge of some of the underlying facts that will be
14 presented in this trial. So I would like you now to explain in
15 your own words what you think the potential conflict is between
16 you and your lawyers. Again, we are working on the assumption
17 that that anonymized stipulation will be agreed upon and your
18 lawyers won't have to withdraw for that reason. So tell me
19 what you think the conflict, potential conflict is here.

20 THE DEFENDANT: If my attorneys are called as
21 witnesses, then they will not be able to defend me with
22 arguments that would benefit me or are good on my behalf.

23 THE COURT: Well, that's true even if they are not
24 called as witnesses because they have knowledge of the
25 underlying facts. Do you understand that? They are going to

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1 be restricted in the types of arguments they can make.

2 Do you understand that?

3 THE DEFENDANT: By this stipulation?

4 THE COURT: No. Why don't you take a moment to talk
5 with Ms. Krissoff.

6 (Defendant, Ms. Krissoff, and Mr. Schertler confer)

7 THE DEFENDANT: Okay.

8 THE COURT: Having talked to your lawyers, can you
9 tell me what you think the potential conflict is?

10 THE DEFENDANT: If they get called as witnesses, there
11 are certain questions that they will not be allowed to ask and
12 certain answers they may not be able to answer on my behalf, so
13 they will be limited to how they would ask or answer questions
14 that would benefit me.

15 THE COURT: And do you understand that that is the
16 case even if they are not called as witnesses because they have
17 knowledge of the underlying facts?

18 (Defendant and Mr. Schertler confer)

19 THE DEFENDANT: Yes.

20 THE COURT: So tell me again now.

21 THE DEFENDANT: That even if they are not called as
22 witnesses, there are certain questions and answers they will
23 not be able to answer on my behalf.

24 THE COURT: Right, because they have knowledge of the
25 underlying facts.

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1 THE DEFENDANT: Yes.

2 THE COURT: All right. Is there anything I have said
3 or asked you about that you want me or your lawyers to explain
4 further?

5 THE DEFENDANT: Not yet. Thank you, your Honor.

6 THE COURT: And do you want your lawyers—that is,
7 Mr. Schertler, Mr. Onorato, Ms. Pinto, Mr. MacDougall—to
8 continue to represent you in connection with the charges which
9 have been brought against you by the federal government?

10 THE DEFENDANT: Yes, I do.

11 THE COURT: Is that your own decision?

12 THE DEFENDANT: Yes, it is.

13 THE COURT: Are you satisfied with your attorneys?

14 THE DEFENDANT: Yes, very much so.

15 THE COURT: Have you had sufficient time to think
16 about this? Because if you wish, I will give you additional
17 time.

18 THE DEFENDANT: No, I don't need more time.

19 THE COURT: Have you received any threat, inducement,
20 payment, or other promise that may have influenced your
21 decision on this issue?

22 THE DEFENDANT: No, your Honor.

23 THE COURT: I want to inform you that there is no
24 guarantee that the trial will be adjourned. I understand that
25 obviously your attorneys need time to prepare for trial, but I

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1 can't give you a guarantee that the trial will be adjourned
2 from May 4.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: May 6, I'm sorry.

6 I make the finding that Mrs. Menendez has knowingly
7 and voluntarily chosen the law firm of Schertler Onorato Mead &
8 Sears, LLP, as her counsel and she has waived her right to
9 conflict-free representation.

10 All right. Thank you. I appreciate it. Let the
11 Court know if a stipulation is reach within two weeks.

12 Anything else?

13 MR. SCHERTLER: Your Honor, may I just -- I hate to do
14 this, but could I qualify your final determination or
15 conclusion, that she has waived her right to conflict-free
16 counsel, as the Court said at the beginning, based on the
17 assumption that the parties can reach a stipulation.

18 THE COURT: Absolutely. Thank you for that
19 qualification. If the parties are unable to reach a
20 stipulation, the great likelihood is that your law firm will be
21 disqualified and you will have to have new attorneys.

22 Sir.

23 MR. MARK: Your Honor, Ms. Menendez's responses to a
24 number of your questions were particularly focused on the
25 potential conflict of her counsel, the limitations there might

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1 be at trial. The government would just request that the Court
2 also ask her that she understands the limitations that might be
3 in place as to her counsel pretrial which could affect the
4 negotiation of the proposed stipulation, the contours of that
5 stipulation, their ability to also negotiate with counsel for
6 other defendants who would also have to sign on to the
7 stipulation, as well, your Honor.

8 THE COURT: I don't understand that point.

9 MR. MARK: The fact is that Mr. Schertler is a
10 potential witness. At least it could potentially affect the
11 advice he would give to Ms. Menendez pertaining to negotiating
12 the proposed stipulation. If he wanted to, for instance, avoid
13 him being called as a witness, it could affect the contours
14 of --

15 THE COURT: Now I understand.

16 Mrs. Menendez, this point is a rather straightforward
17 one. The fact that Mr. Schertler has knowledge of the
18 underlying facts here may impact on his negotiations with the
19 government in regard to arriving at that stipulation that we
20 are talking about.

21 Do you understand that? Because it may be in his
22 interest to emphasize one point over another that he wouldn't
23 be doing were he not -- he does not have knowledge of the
24 facts.

25 Do you understand?

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1 (Defendant, Mr. Schertler, and Ms. Krissoff confer)

2 THE DEFENDANT: I understand.

3 THE COURT: Do you understand?

4 THE DEFENDANT: I understand that. And I understand
5 that when the prosecutors and my attorneys agree on a
6 stipulation, I also have to agree to it. It will be -- I will
7 also have a --

8 THE COURT: Okay. Yes.

9 THE DEFENDANT: Yes.

10 THE COURT: I take it that's true.

11 MR. SCHERTLER: That's true. And not only that, but
12 Ms. Krissoff is -- will be available to offer independent
13 advice on the stipulation.

14 THE COURT: All right. Good. Thank you.
15 Anything else?

16 MR. MARK: Just now relating to how this could play
17 out at trial, I think Ms. Menendez's responses to the Court's
18 questions were particularly focused on how her counsel would
19 ask questions at the trial, and just to confirm that she
20 understands that this also could limit pretrial motions that
21 are filed, motions that were made during trial --

22 THE COURT: The government's point here is that this
23 conflict, it exists right now, this potential conflict, because
24 your attorneys participated in some of the underlying facts.
25 So everything I've told you about involves pretrial area as

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1 well as trial itself. That's the point the government is
2 making.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: All right. Apparently there is some other
6 issue that the parties want to take up that Mr. Menendez's
7 lawyer wants to take up.

8 MR. WEITZMAN: Yes, your Honor. If I could have two
9 minutes of your Honor's time.

10 THE COURT: Of course. I take it the other side is
11 here. Thank you.

12 I'm going to step off the bench, because I think
13 people are probably here for the *Curcio* hearing, and then I
14 will come right back out.

15 (Recess)

16 (Continued in U.S. v. Robert Menendez transcript)

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